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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

GORDONS TRANSPORTS, INC.,
Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division of the United States Department of Labor,
Respondent.

No. 210.

PETITION FOR REHEARING OF THE PETITIONER GORDONS TRANSPORTS, INC.

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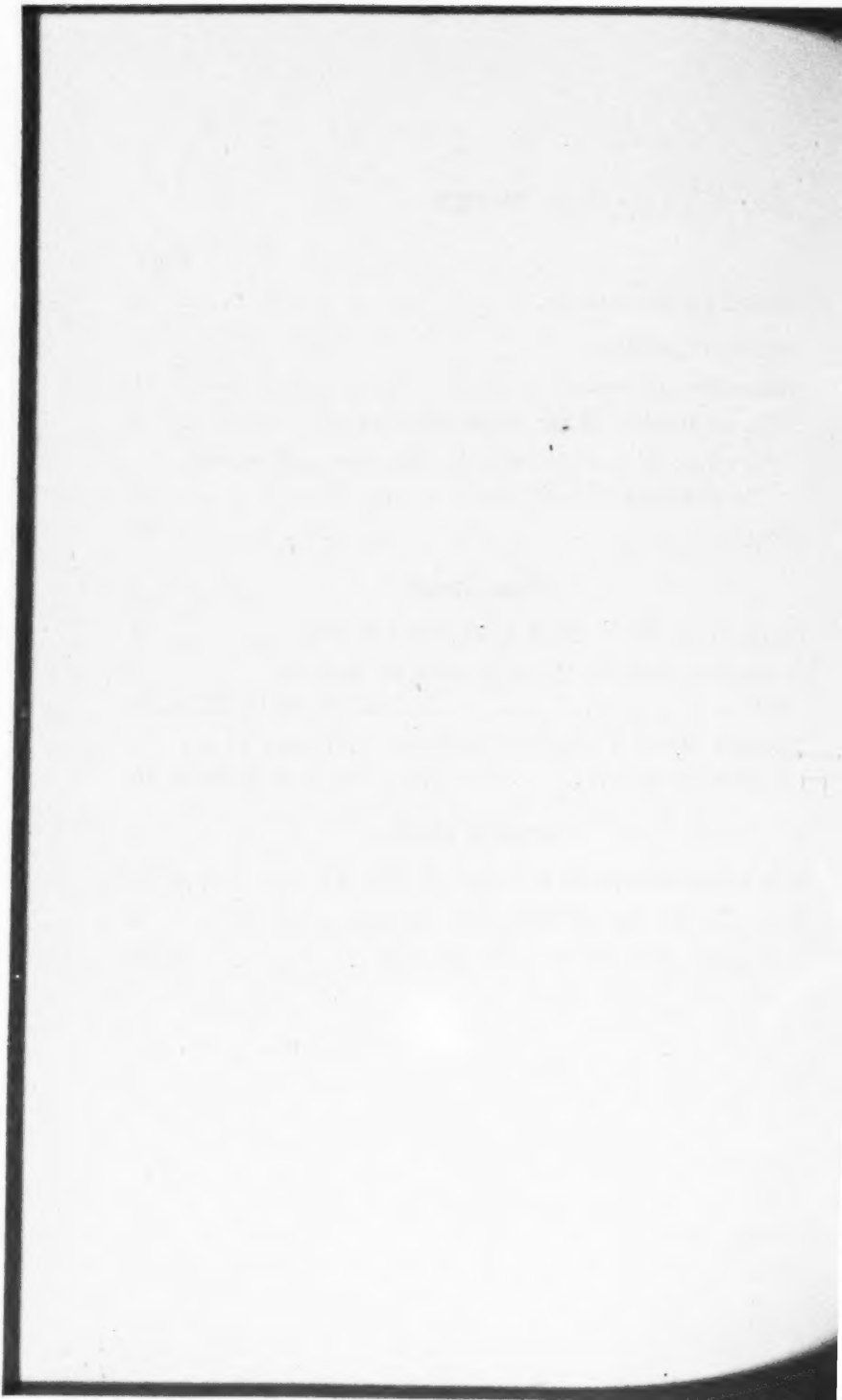

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Gordons Transports, Inc., petitioner herein, and petitions the court for a rehearing of this cause, and for grounds of its petition states:

STATEMENT OF CASE.

The District Court held that those of petitioner's employees classified as "breakout men," "wheelers" and "hostlers," were not subject to the jurisdiction of the

Interstate Commerce Commission, under Section 204 (a) of the Motor Carrier Act of 1935, and that consequently the exemption contained in Section 13 (b) 1 of the Fair Labor Standards Act does not apply to them.

The District Court made this ruling solely on the basis of its own determination as to whether or not the duties performed by these employees "affected safety of operation," and that these employees who spend a **greater part of their time** at such activities are not within the 13 (b) (1) exemption.

The District Court at no place in its findings and conclusions, referred to, or even considered, the decisions of the Interstate Commerce Commission[1] relating to "loaders" and "drivers," but simply decided the question solely on the basis of its own determination as to the effect on safety which their duties have, and the fact that these employees spent a **greater portion** of their time at such activities.

This action of the District Court was affirmed by the United States Circuit Court of Appeals,[2] and a petition for certiorari for a review of this judgment was duly filed in this court.

This petition for certiorari was perfunctorily denied by you on October 13, 1947, **without reason, opinion or citation.**[3]

This petition is, therefore, filed to earnestly request you to reconsider your decision of denial of our writ, and give

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1 Ex Parte No. MC-2, 28 M. C. C. 125, 138, 139.

2 162 F. (2) 203.

3 Your order is as follows:

"The motion to substitute William R. McComb, present Administrator of the Wage and Hour Division of the United States Department of Labor, in the place and stead of L. Metcalfe Walling, resigned, is granted. The petition for writ of certiorari is denied."

this petitioner an opportunity to fully present this matter to you, it being a most important one to this petitioner, and to the trucking industry of our nation, in order that the industry may know how to conduct its operations, in the future, and to know exactly how the Fair Labor Standards Act affects that industry.

Are you going to permit this affirmance of this judgment to stand when you absolutely, to the contrary in the **Pyramid Case**, infra, held that it was the **power** of the **Interstate Commerce Commission** to determine what duties performed by motor carrier employees affect safety of operation, and when you in the **Levinson** case, infra, held that all employees who do any exempt type of work for, however short, a time, regularly or casually, fall within the Commission's power to regulate, and hence under the 13 (b) (1) exemption.

THE CONTENTION OF THE ADMINISTRATOR.

We might summarize the contention of the Administrator with respect to "breakout men" and "wheelers," and "hostlers" as is expressed in the respondent's brief on page 7 as follows:

> "After making precise findings with respect to each step of petitioner's loading and unloading operations, in which it set forth in meticulous detail the specific duties of the 'wheelers,' 'breakout men,' and 'hostlers,' the District Court reached the conclusion that the activities of these employees did not directly affect safety of operation of motor vehicles transporting property in interstate commerce."

The Administrator further says on page 11, of the brief, that:

> "It is well settled that the Commission may regulate the hours and qualifications only of employees

whose duties affect safety of operation of motor vehicles in interstate commerce. It is equally clear from the findings of the District Court, in this case, that the activities of the 'breakout men,' 'wheelers,' and 'hostlers' do not effect such safety. The decision of the court below is therefore patently correct and does not require a review by this court."

Our contention is that:

Under the **Pyramid** Case, infra, the court has no jurisdiction to inquire into whether or not the duties of particular employees affect safety of operation, but, with the Commission having made this determination, the sole function of the court is to determine, "by judicial process" whether or not the duties performed by a particular employee or class of employees, constitute them members of the class as defined by the Interstate Commerce Commission, i. e., "loaders" or "drivers," and if they spend any time at these activities, they are exempt.

The Administrator says, brief p. 10, that the "checkers" and "stackers" performed all the loading and were held exempt. The record does not so show. The "breakout men" and "wheelers" load and unload, just as do the "checkers" and "stackers." They are an integral part of each loading crew, moving freight in and out of trucks, without whom the crew could not function. Furthermore some of their time is actually spent each day in placing heavy shipments where they will be transported in their over-the-road journey. So it is clear that the "checker" and "stacker" do not perform all of the loading.

THE EFFECT OF YOUR HOLDING IN THIS CASE AND REASONS FOR GRANTING OF CERTIORARI.

By the denial of the petition in this case, without further ado, you have held that the applicability of the 13 (b) (1) exemption is to be determined by the court deciding the single question of whether or not an employee's "duties" affect safety of operation, **without giving any consideration to the Commission's decision relating to** the class of employees here involved, namely "loaders" and "drivers."

Why you so held in this case, when you held directly the opposite in the cases of **Levinson v. Spector Motor Service,**[4] and **Pyramid Motor Freight Corporation v. Ispass et al.,**[5] is not comprehendable to us, and will not be to the vast industry here involved, nor is it consistent with the principles of judicial precedents, which you have followed ever since this court was established.

Speaking of the Commission's jurisdiction over "loaders" in the **Levinson** Case you said:

> ". . . We recognize that the Commission has such power over all employees of such carriers whose activities affect safety of operation and that the Commission does not have such power over employees whose activities do not affect safety of operation."

Speaking of the weight to be given the Commission's decision, you said in the same case:

> "We have set forth the Commission's record of supervision over this field of safety of operation to demonstrate not only the extent to which the Com-

4 67 Sup. Ct. 931—which will be referred to as the Levinson case.

5 67 Sup. Ct. 954—which will be referred to as the Pyramid case.

mission serves Congress in safeguarding the public with respect to qualifications, maximum hours of service, safety of operation and equipment of interstate carriers, but to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations."

Referring to the duties performed by the employee involved in the **Levinson** Case you said:

"We have in this case an employee working full time throughout his employment as a 'checker' or 'terminal foreman.' If he had worked full time as a 'loader' **as defined by the Commission,** he would have been unquestionably within the jurisdiction of the Commission, to the extent necessary to exclude him from Section 7 of the Fair Labor Standards Act. (Emphasis ours.)

. . . . . .

". . . So here it is enough for the purposes of this case that a substantial part of the petitioner's activities consisted of the **doing or immediate direction of the very kind of activities of a loader that are described by the Commission as directly affecting safety of operation.**" (Emphasis ours.)

Speaking of the Commission's opinion (28 M. C. C. 126, pages 138-139) you said:

"We recognize the Interstate Commerce Commission as the agency charged with the administration and enforcement of the Motor Carrier Act **and especially** charged with the establishment of qualifications and maximum hours of service of employees of common and contract carriers and private carriers of property by motor vehicle, in interstate and foreign commerce. We see no reason to question its considered conclusion that the activities of full duty **drivers,** mechanics, **loaders,**[6] and helpers, **as defined by it,**

6 The "breakout men" and "wheelers" here involved are full duty loaders.

affect safety of operation of the carriers by whom they are employed." (Emphasis ours.)

. . . . . .

". . . We hold that the Commission has the power to establish qualifications and maximum hours of service under Section 204 (a), with respect to full-duty employees engaged in doing the work of loaders, although the Commission has not exercised that power affirmatively by establishing qualifications and maximum hours of service with respect to loaders."

Your conclusion in the **Levinson** Case, where you held that the "checker," because he loads or supervises loaders, is subject to the 13 (b) (1) exemption, is as follows:

"Our conclusion is that, under the Motor Carrier Act, the Interstate Commerce Commission has power to establish qualifications and maximum hours of service for those employees whose service affects the safety of transportation of common carriers, contract carriers or private carriers of property in interstate and foreign commerce; that such Commission has been charged with the administration and enforcement of that Act; and that in the course of performance of its duties and after extended hearings on the subject, it has found that the work of loaders, as defined by it, affects safety of motor carrier operation. Furthermore, we conclude, upon the findings of the lower courts in this case, that the petitioner was employed by a motor carrier of interstate freight within the meaning of the Motor Carrier Act and that, throughout the period at issue, a substantial part of his activities consisted of doing, or immediately directing, the work of one or more loaders as defined by the Interstate Commerce Commission and affecting the safety of operation of motor vehicles in interstate or foreign commerce; that, accordingly, the Commission, with respect to him, had power to establish qualifications and maximum hours of service; and that, by virtue of Section 13 (b) (1) of the Fair Labor Stand-

ards Act, the provisions of Section 7 of that Act, as to overtime pay were rendered inapplicable to him. The judgment of the Supreme Court of Illinois therefore is **Affirmed.**"

In the **Pyramid** case, in setting forth the issues of the case, and speaking of how the case should be handled on remand, you said:

"This will include a direction to the District Court to determine whether or not the activities of each respondent consisted wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in Ex Parte No. MC-2, 28 M. C. C. 125, 133, 134, as that of a 'loader' of freight for an interstate common carrier by motor vehicle, and as affecting the safety of operation of motor vehicles in interstate or foreign commerce."

Further in the opinion in that case, on the merits of the case, you said:

"There thus will remain to be determined by the District Court, the question of whether the activities of the respective respondents consisted, either wholly or in substantial part, of the class of work which is defined by the Interstate Commerce Commission in Ex Parte No. MC-2, 28 M. C. C. 125, 133, 134, as that of a 'loader,' and as affecting the safety of operation of motor vehicles in interstate or foreign commerce."

You further said in this same opinion:

"Under these circumstances, there is no occasion for us to refer to the Commission any question presented in this case nor to suspend the long delayed final judgment pending further findings by the Commission. The Commission has done its work. The District Court must determine simply whether or not the respective employees who seek to recover overtime compensation under Section 7 are excluded from the benefits of that Section because they are within the above classification. **The special knowledge and**

experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process." (Emphasis ours.)

And then you said:

"If none of the alleged 'loading' activities of the respective respondents, during the periods at issue, **come within the kind of activities which, according to the Commission, affect safety of operation of motor vehicles** in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of Section 7 of the Fair Labor Standards Act. On the other hand, if the whole or a substantial part of such alleged 'loading' activities of the respective respondents, during the periods at issue, do come within the kind of activities which, according to the Commission, affect safety of operation, then those respondents, who were engaged in such activities are excluded from the benefits of such Section 7."

So in these two cases, you have reconfirmed the **power** of the Interstate Commerce Commission, and it **alone**, to determine whether or not the duties performed by certain employees of motor carriers affect safety of operation.

In the **Levinson** case, you have unqualifiedly approved the Commission's findings that the duties performed by "loaders" affect safety of operations, and hence such employees are under the Commission's jurisdiction for the purpose of the prescription of "qualifications and maximum hours of service and safety of operations and equipment."[7]

With this decision of the Commission having been issued and being still in effect, you have said that there is no need

[7] U. S. Code, Title 49, Section 304 (a) (1).

to refer any further questions in this regard to the Commission, but that the only matter **now** left to be determined in cases where the 13 (b) (1) exemption is in issue is for the court to decide whether or not the **duties performed** by a given employee "come within the kind of activities which, according to the Commission, affect safety of operation." [8]

Yet in the instant case, by inference, you say that the court can and should determine whether or not such an employee's **duties affect safety** of operation without ever once mentioning or considering the Commission's decisions, or considering the question of whether the duties performed by the **employees involved here** bring them within the contemplation of the class of a "loader" and "driver," as those classes are defined by the Commission, in the cited report.

In the **Levinson** case, you say one thing, and in **this case** you say just the opposite. Upon what standards is Gordons Transports, Inc., and **all of the other motor carriers throughout the nation** going to rely?

Shall motor carriers consider the determination by the **Interstate Commerce Commission,** with respect to those classes of employees whose duties affect safety, as conclusive, or shall they (by reason of your opinion in the instant case) speculate upon what their respective district court shall consider as those classes of employees whose duties affect safety? The class of employees here involved are those "who transport freight between trucks or between the dock and the truck," [9] and are "loaders," or

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8 The Pyramid case.

9 The Commission defined a loader as follows:

"The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse." 28 M. C. C. 125, p. 133.

they are those who "drive" trucks and are "drivers." The class of employees (wheelers and breakout men) here involved are "loaders" and are the same class of employees whom Levinson supervised as a checker. You found that he as a "checker" exercised duties indirectly affecting safety of operations, because he supervised employee loaders, whose actual physical work **DIRECTLY** affected safety of operations.

It is unnecessary to point out the inconsistency in your holding that "Levinson" was exempt (under the Commission's decision) because he supervised employees (loaders) whose duties affected safety, and your decision in this case, to the effect that those same (loaders) employees do not affect safety "under the finding and conclusion of the District Court."

In the Court of Appeals we urged that it was error for the District Court to hold that it could determine whether or not an employee's duties affected safety of operation.[10] In this court, in our petition for certiorari, we made the same contention, but by denying our petition you have said no, Judge Boyd is correct and the Commission's order is of no effect, without giving your reason, and thereby you have again placed the matter of the status of these employees right back in the same muddle in which it has been ever since the passage of the Fair Labor Standards Act, and the issuance of the numerous conflicting regulations of the Administrator, which has covered a period of nearly ten years.

When the Commission issued its Ex Parte No. 2 decision, supra, we of the motor carrier industry thought that the status of "loaders" and "drivers" of trucks had been clarified, but such was not the case. Promptly the Wage and Hour Administrator proceeded, with an attempted

10 Brief p. 8.

usurpation of the jurisdiction of the Commission, through the issuance of various regulations, which he changed from time to time, as suited him. Thereupon the situation was again disturbed, and remained so until you decided the **Levinson** and **Pyramid** cases, at which time the motor carrier industry felt that they at last had the word of our Supreme Court that the Ex Parte No. 2 decision of the Commission was sound, valid and enforceable, and that they could use it as their guide in the conduct of their business, and as a standard for their relationship with their employees.

This industry felt that they could, at last, definitely classify their employees, give them certain duties to perform, and pay them either under the Wage and Hour Act or not, depending upon whether their duties brought them within the classifications, as defined by the Commission, without fear of having a tremendous retroactive pay bill, and penalties pile up against them because of a misapprehension as to their duties, obligations and liabilities under the several decisions and interruptions of the Commission and the Administrator.

However, this feeling of security was short lived because some seven months after your decision in the **Levinson** and **Pyramid** cases **you held absolutely contrary to your holding in the Levinson and Pyramid** cases, and have, in effect, set aside the clear effect of the decision of the Interstate Commerce Commission, which you upheld in those two cases, and you have held here that the District Court, and not the Commission, shall determine whether or not employees, of a class (loaders and drivers) found by the Commission to affect safety, does in **fact** affect safety.

This is exactly the situation, despite the fact that the employees involved in the instant case are "loaders" and "drivers" and are the same identical employees who are

supervised by the "checker" Levinson, whom you held exempt because he supervised the duties of employees whose duties affect safety of operation, according to the Commission's decision.

What you intended to hold by a denial of our petition is not clear. Under the Pyramid case the industry thinks you meant that the Commission's decision governs the determination of the question, and the only matter to be determined by the court is whether or not a given employee performs duties, which brings him within the defined classification as set up by the Commission, and held by the Commission to be subject to its jurisdiction under United States Code Title 49, Section 304 (a) (1).

Under your decision in the instant case it appears that you intended to hold that the District Court, and not the Commission, determines whether or not an employee's duties affect safety, wholly without regard to the Commission's decision.

Your order in this case, without explanation or opinion, has further muddled an altogether muddled situation, as the type of motor carrier employees here involved, consists of the vast majority of "loaders" (wheelers, stackers, breakout men and checkers) of the conventional "usual type" common motor carriers. The instant case has attracted national attention and the decision of the District Court has been widely followed in the various state courts, particularly as compared to the **Levinson** case, involving a "checker" who was simply the supervisor of a "loading crew" which consists of eight to twelve members.

Further, it must be remembered that the present suit is an injunction suit, and if the order of the District Court is made permanent in its present form, this petitioner must henceforth live and conduct its affairs according to the

mandate of the injunction, even though other members of the trucking industry having identical operations, may in view of the apparent favorable holdings in the **Pyramid** and **Levinson** cases, assume that "loaders" supervised by a "checker" are exempt from the overtime provisions of the "wage and hour" law.

Or other common motor carriers will be in grave doubt as to how to conduct their business, that is whether under the dicta of your opinion in the **Levinson** and **Pyramid** cases, or in accordance with Judge Boyd's opinion in the instant case.

In this case, you have perfunctorily denied our petition. We say that this petitioner and the motor carrier industry, are entitled to an expression from **this** court as to whether or not the class of employees here involved (employees who perform the duties of "wheelers," "Breakout men" and "hostlers"), are within the Commission's defined classification of a "loader" and a "driver." If this court thinks that these employees are not covered by the definitions promulgated for these classifications, because the particular work performed by such employees was not within the contemplation of the Commission when it set up its definition of a "loader" or a "driver," then we earnestly feel that this court should so say in a clear opinion to that effect. If this court feels that the District Court, and not the Commission in the instance of every loader in the United States, can say, despite the **Pyramid** case, what employees are not subject to the jurisdiction of the Commission, then it should so advise this petitioner and other motor carriers throughout the Country.

The industry as a whole, is entitled to a clear statement from this court as to just where it stands on these matters, especially after ten years of uncertainty existing under the administrator's varied interpretations.

In view of the apparent direct conflict between your decision in this case, and your decisions in the **Levinson** and **Pyramid** cases, we respectfully urge this court to reconsider its denial of our petition for certiorari, grant that petition, and then decide this case with an opinion which will be informative and binding on this petitioner, and its employees, as well as the other members of the large and important industry of which petitioner is a member.

PRAYER.

Wherefore, premises considered, petitioner prays:

1. That this Court reconsider its order of October 13, 1947 herein.

2. That this Court reverse its order of October 13, 1947, and grant certiorari in this case.

3. That this Court reverse the District Court and the United States Circuit Court of Appeals and hold that the "breakout men" and "wheelers" or "loaders" as defined by the Commission, that "hostlers" are "drivers" as defined by the Commission. That they are subject to the jurisdiction of the Interstate Commerce Commission and therefore subject to the 13 (b) (1) exemption of the Fair Labor Standards Act.

4. That this Court grant the petitioner such other and further relief to which it may be entitled.

Respectfully submitted,

JAMES W. WRAPE,
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WRAPE & HERNLY,
Attorneys for Petitioner.

November 4, 1947.

Certificate of Counsel.

I, James W. Wrape, one of the Counsel for petitioner in the foregoing petition do hereby certify that the foregoing petition is not presented for delay, but is presented in good faith for the matters set forth in said petition.

.....

James W. Wrape.